THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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BOARD OF REVIEW DECISION

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BR-112274-XA (Feb. 9, 2012) – The extensive regulation of this interstate truck driver's work activities imposed by federal law, the contractual terms which prohibited the claimant from using his leased truck to haul for other carriers, and the requirement that he obtain the employer's approval to sublease his truck compelled the Board to conclude that the claimant was an employee and not an independent contractor under state law.

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Division of Unemployment Assistance (DUA), which held that the claimant's services constituted employment within the meaning of G.L. c. 151A, § 2. We review pursuant to our authority under G.L. c. 151A, § 41, and affirm.

An unemployment benefits claim filed by the claimant triggered a DUA Employer Liability Unit inquiry into the employment relationship between the appellant employer and the claimant. In a determination issued on April 29, 2009, the agency determined that the services which the claimant performed were those of an employee, not an independent contractor. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the employer and a representative of the Employer Liability Unit, the review examiner affirmed the agency's determination in a decision rendered on November 20, 2009. We accepted the employer's application for review.

The review examiner concluded that the claimant was not free from the employing unit's direction and control, as required under G.L. c. 151A, § 2(a). Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal.

The issue on appeal is whether, in light of the intensive federal regulatory requirements imposed on the terms of their relationship, the claimant's over-the-road truck driving services for the employer were performed as an employee or as an independent contractor within the meaning of G.L. c. 151A, § 2.

Findings of Fact

The review examiner's findings of fact and credibility assessments are set forth below in their entirety:

1. The alleged employer (the "employer") is engaged in the over road motor carrier business.

2. The claimant was hired by the employer as a truck driver on February 25, 2008 and completed his training on April 24, 2008.

3. The claimant was trained by other drivers, employed by the employer, as he rode with the other drivers on their routes.

4. The claimant was taught how to complete the employer's log books, DOT requirements, trip planning, truck safety, and customer service.

5. It is unknown how the claimant was paid during the claimant's training period.

6. On or about April 24, 2008 the employer offered the claimant the option of remaining as an employee or becoming an independent contractor, whereby he would lease a truck and take over responsibility of fueling the truck and the maintenance of the truck.

7. The employer advised the claimant that he would have the opportunity to earn more money as an independent contractor.

8. The claimant agreed to work as an independent contractor.

9. From April 24, 2008 until March 5, 2009, the claimant was paid $.90 - $1.53 per mile, depending on the length of the trip.

10. The claimant was offered a 'load' from the employer's dispatcher via a radio device installed in the truck the claimant leased.

11. The claimant could accept or refuse the 'load' without repercussion.

12. The claimant was required, per DOT regulations, to submit trip logs to the employer, and to report any accidents to the employer.

13. Upon completion of a trip, the claimant was required to submit proof of the trip (i.e. - documents from the customer) to the employer in order to be paid for the trip.

14. The claimant chose his own schedule but was required to pick up and deliver the load according to the customer's demands.

15. The claimant was not allowed to solicit business from customers on his own.

16. On March 20, 2009, the claimant filed an unemployment claim. The effective date of the claim is March 8, 2009.

Ruling of the Board

The Board adopts the review examiner's findings of fact. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

Employment is defined under G.L. c. 151A, § 2, which states, in relevant part, as follows:

> Service performed by an individual, . . . shall be deemed to be employment subject to this chapter . . . unless and until it is shown to the satisfaction of the commissioner that—
>
> (a) such individual has been and will continue to be free from control and direction in connection with the performance of such services, both under his contract for the performance of service and in fact; and
>
> (b) such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and
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> (c) such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

The three prongs of this "ABC" test are conjunctive. Therefore, if the employer fails to prove any one of the prongs, the relationship will be deemed to be employment. Coverall North America, Inc. v. Comm'r. of Division of Unemployment Assistance, 447 Mass. 852, 857 (2006).

Section (a)—*free from direction and control*

The record revealed that lease terms between the claimant and the employer imposed many limitations on the claimant's freedom of action. These limitations included, *inter alia*, requirements that the claimant: (1) keep transportation logs (49 CFR 376.12(f)); (2) not carry passengers without advance employer approval (49 CFR 392.60(a)); (3) place the employer's name and USDOT number on the cab doors (49 CFR 390.21); (4) abide by the employer's drug and alcohol testing policy (49 CFR 382.103, 105, 107); (5) comply with the employer's safety policies; (6) meet all employer-approved customer requirements; (7) not engage another person to load or unload less than 10,000 pounds at a single point; (8) not hire others to perform driving tasks without the employer's approval; (9) not work directly for the employer's customers; and (10) not refuse an assignment unless there were other truckers available to take it.[1] Additionally, the claimant could not sublease the vehicle without the employer's consent.

On the other hand, the claimant determined: (1) his own route; (2) his hours; (3) where to get his truck serviced; and (4) from whom to buy insurance. He also had his own commercial driver's license. This enabled him, should he so choose, to drive a truck owned by another owner operator or motor carrier, while he hired someone else (with the employer's approval) to drive his truck for the employer.

With regard to the direction and control prong of G.L. c. 151A, § 2, the Supreme Judicial Court has stated that "[T]he test is not so narrow as to require that a worker be entirely 'free from direction and control from outside forces.'" Athol Daily News v. Board of Review of the Div. of Employment and Training, 439 Mass.171, 178 (2003). On balance, we agree with the review examiner that the claimant was not free from the employer's direction and control as he was subject to extensive controls. Therefore, we conclude that the employer has failed to meet its burden under prong (a).

In its appeal, the employer asserts that the direction and control exerted over the claimant was largely mandated by federal laws that tightly regulate the commercial trucking industry. And, the employer further argues, because the control is mandated by federal law, the Board should not rely on it in analyzing G.L. c. 151A, § 2(a). We disagree and conclude that the extensive regulation of the claimant's work activities imposed by these regulations compel the conclusion that he be classified as an employee rather than an independent contractor under state law.

Federal transportation rules have been implemented to protect public safety, establish clear lines of liability, and ensure the flow of goods across state lines. 49 U.S.C. § 13101. Motor carriers, such as the employer, must be authorized by the Secretary of the Department of Transportation (DOT) to engage in interstate trucking. 49 U.S.C. § 13902. DOT is responsible for regulatory duties or prohibitions imposed upon drivers. 49 CFR 390.11. If the motor carrier wishes to utilize trucks that it does not own to transport goods, it may do so under a written lease agreement, which terms require the motor carrier to "have control of and be responsible for

[1] We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

operating those motor vehicles in compliance with requirements prescribed by the Secretary on safety of operations and equipment, . . . as if the motor vehicles were owned by the motor carrier." 49 U.S.C. § 14102(a)(4).

There is nothing under these federal regulations that requires us to reach a conclusion that the claimant was an independent contractor as a matter of law. Rather, the regulations under 49 CFR 376.12(4), provide, in relevant part, as follows:

> Nothing in . . . this section is intended to affect whether the . . . driver is an independent contractor or an employee of the authorized carrier . . . An independent contractor relationship *may* exist when a carrier . . . complies with 49 USC § 14102 and attendant administrative requirements. (Emphasis added.)

The employer would have us say that the controls set forth under the DOT regulations must be excluded from our consideration. We decline to do so.

A fair reading of this regulation is that the federal rules are not intended to dictate the employment relationship either way. Certainly, the rules may not force the drivers and motor carriers into an employment relationship. By use of the word "may," the text also establishes that the law does not impose an independent contractor relationship. *See* In the Matter of the Claim of John Short, 649 N.Y.S.2d 955, 957 (N.Y. App. Div. 1996)(federal law does not compel the owner-operator lessor to be an independent contractor).

At issue in this appeal is the application of *state* law, specifically the Massachusetts unemployment statute, not the employment classification standards that apply to Federal employment taxes. The Massachusetts unemployment insurance statute expressly includes "service in interstate commerce" in its definition of "employment." G.L. c. 151A, § 1(k). For the Legislature to specifically incorporate service in interstate commerce, and then exempt such service on the ground that federal law imposes significant control over those services makes no sense. The specific issue before us is the degree of direction and control exercised over the claimant. The frame of our analysis is between the employer and the worker, not the employer and the federal government.

In support of its appeal, the employer also offers a 2001 Letter Ruling from the Internal Revenue Service, which found another owner-operator to be an independent contractor, for the purposes of Federal (not *state)* employment taxes. (Exhibit 19a). The letter ruling lacks sufficient factual detail to enable us to compare that relationship with the one before us. Moreover, even if it is the administrative practice of the Internal Revenue Service, relying on the same set of facts, to rule that such an owner-operator is not entitled to coverage under Federal Unemployment Tax Act (FUTA), Massachusetts is free, as a State agency, to provide additional unemployment coverage. As long as State unemployment laws provide the minimum amount of coverage set forth under FUTA, the State is in compliance with FUTA. *See* 26 U.S.C. § 3305(j). For these reasons, we do not find the Letter Ruling to be controlling and we decline to follow it.[2]

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[2] *See also* 26 USC § 6110(k)(3), which provides that such written determinations may not be used as precedent; Amergen Energy Co., LLC v. United States, 94 Fed.Cl. 413, 419 (Fed. Cl. 2010)(the I.R.S. issues private letter

Section (b)—*work is performed outside of the usual course or all the places of business*

Transportation of refrigerated goods was self-evidently within the scope of the employer's usual business. However, the claimant's services were essentially performed on the road and outside of the company's places of business. *See* Athol, 439 Mass. at 179. Therefore, the employer has satisfied prong (b).

Section (c)—*engaged in an independent trade or business*

The SJC requires the following approach to evaluating part (c). In order to assess whether a service could be viewed as an independent trade or business, we must consider whether "the worker is capable of performing the service to anyone wishing to avail themselves of the services or, conversely, whether the nature of the business compels the worker to depend on a single employer . . . ." Athol, 439 Mass. at 181.

In this case, the claimant had his own independent commercial driver's license and the terms of the claimant's lease agreement with the employer did not force him to work exclusively for the employer. However, the claimant was not allowed to solicit business from customers on his own. Indeed, without formal authorization from the Secretary of Transportation to act as a motor carrier, he was not permitted to do so by law. The terms of his lease agreement did not permit the claimant to use his truck to transport goods for other carriers unless he canceled his lease agreement with the employer.

Nor was the claimant permitted to sublease his truck during the term of the lease without the employer's approval. He could hire himself out as a driver of someone else's truck, provided that he found a substitute, who was acceptable to the employer, to drive his own truck. However, looking at the arrangement as a whole, we conclude that the claimant was, in effect, compelled to work for only one employer. The facts in this appeal strongly resemble the circumstances in the Coverall case, where the terms of that claimant's agreement with the employer required her to rely heavily on the single company. 447 Mass. 852. *Compare* Comm'r. of Division of Unemployment Assistance v. Town Taxi of Cape Cod, Inc., where licensed cab drivers who were free to use their company-leased cabs to engage in other employment were held to be independent contractors. 68 Mass.App.Ct. 426, 428 (2007).

Since the terms of the lease agreement prevented the claimant from engaging in an independent enterprise, the employer did not satisfy prong (c).

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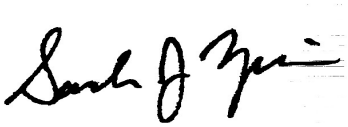
rulings on a relatively expedited basis and section 6110(k)(3) ensures that they may only be used as precedent by the same taxpayer as evidence of the administrative practice of the I.R.S.)

We, therefore, conclude as a matter of law that the claimant's truck driving services for the employer were performed as an employee within the meaning of G.L. c. 151A, § 2. The review examiner's decision is affirmed.

BOSTON, MASSACHUSETTS
DATE OF MAILING - February 9, 2012

John A. King, Esq.
Chairman



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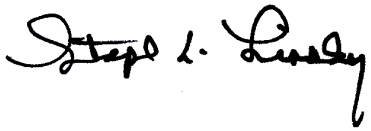

Stephen M. Linsky, Esq.
Member

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT
(See Section 12, Chapter 151A, General Laws Enclosed)

LAST DAY TO FILE AN APPEAL IN COURT- March 12, 2012

ab/jv